

STATE OF MICHIGAN
COURT OF APPEALS

NELLIS D. HUBERS and LEONA M. HUBERS,

Plaintiffs-Appellants,

v

MILLER, CANFIELD, PADDOCK & STONE,
P.L.C.,

Defendant-Appellee.

UNPUBLISHED

April 11, 2006

No. 258746

Kent Circuit Court

LC No. 02-000224-NM

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiffs, husband and wife, appeal by right from the circuit court order granting summary disposition under MCR 2.116(C)(10) in favor of defendant law firm on plaintiffs' action alleging legal malpractice. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arose out of defendant law firm's unsuccessful representation of plaintiffs in their attempt to recoup \$200,000 by reaching an alleged asset of Donald Ritsema. Donald Ritsema and Lynnette Jach were married in 1975 and purchased a house using the pre-marital assets of both parties. In 1986, Ritsema transferred his interest in the house to Jach by quit claim deed. In 1992, Jach refinanced the house and purchased a condominium of which she had sole ownership. In 1995, plaintiffs, Nellis D Hubers and Leona M. Hubers, gave Ritsema \$200,000 to invest for them. However, Ritsema converted the money to his own use. In August 1996, Jach filed for divorce. Plaintiffs moved to intervene in the divorce proceeding in order to recoup some of their money. The motion was denied. Jach retained her sole ownership of the condominium.

In September 1996, plaintiffs retained Miller, Canfield, Paddock & Stone, P.L.C. ("Miller Canfield") as counsel and sued Ritsema for fraud. Plaintiffs later added Jach as a defendant, arguing that the judgment of divorce was a fraudulent conveyance under the Uniform Fraudulent Conveyance Act ("UFCA"), MCL 566.11 to 566.23,¹ because it conveyed Ritsema's interest in

¹ In 1998, the Michigan contemporaneously adopted the Uniform Fraudulent Transfer Act, MCL (continued...)

the condominium to Jach. Jach moved for partial summary disposition, which the trial court granted on November 9, 1998. The trial court found that the condominium was not an asset subject to the UFCA and that the judgment of divorce did not convey any ownership of or interest in the condominium from Ritsema to Jach.

After three attempts, plaintiffs' counsel, Miller Canfield, failed to perfect an appeal of the November 9, 1998 order. On September 23, 1999, Miller Canfield filed a claim of appeal for plaintiffs, which the Court of Appeals dismissed because the order was not final. On November 18, 2000, Miller Canfield filed another claim of appeal, which the Court of Appeals dismissed as untimely. Finally, Miller Canfield filed a claim of appeal on February 8, 2001, which the Court of Appeals dismissed as untimely and further denied rehearing. The Supreme Court also denied plaintiffs' application for leave to appeal. Each attempted appeal was denied for technical or procedural reasons, without reaching the merits of plaintiffs' claims.

Plaintiffs then sued defendant Miller Canfield alleging malpractice. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that its negligence in failing to perfect an appeal could not have proximately caused plaintiffs' loss because the trial court's decision in the underlying action was legally correct and because the Court of Appeals would not have reversed it. The trial court agreed with defendant, granted the motion, and dismissed the case.

On appeal plaintiffs argue that the trial judge erred as a matter of law in finding that the condominium was not an "asset" under the UFCA and that Ritsema's divorce judgment could not be a "conveyance" of property under the UFCA. We disagree. This Court reviews de novo the trial court's decision whether to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In order to establish legal malpractice, the plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence in the legal representation, (3) that the negligence proximately caused an injury, and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

The condominium was not an "asset" under the UFCA. Section 1 of the UFCA, MCL 566.11, provides as follows:

In this act "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets. "Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.

Based on the record in this case, Jach owned the condominium before the divorce and she remained the owner of the condominium after the divorce. Because Ritsema did not own the

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566.31 to 566.43, and repealed the UFCA. Because Ritsema's alleged fraudulent conduct occurred before 1998, the UFCA applies to the claims in this case.

condominium, it was not property or an asset liable to pay any of his debts. At most, Ritsema had a potential interest in the condominium because it was technically part of the marital estate that the trial judge in the underlying action could have awarded to Ritsema under MCL 552.23(1) and 552.401. But Ritsema's potential interest never actualized because the trial judge did not award any interest in Jach's condominium to Ritsema. Therefore, the condominium was not Ritsema's asset because it was not property available to pay his debts. Accordingly, the UFCA does not apply to the condominium.

Further, the UFCA does not apply to the Ritsemas' judgment of divorce because the judgment of divorce did not effect a conveyance as contemplated by the act. If the language of the statute is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written. A court may not read anything into clear statutory language that is not derived from the words of the statute. *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220, 224; 666 NW2d 199 (2003). Further, under the principle of *expressio unius est exclusio alterius*, the express mention of some things implies the exclusion of other things. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990). The UFCA defines "conveyance" as "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance." A judgment is not the common or ordinary meaning of "conveyance" and is not one of the forms of "conveyance" listed in the statute. Therefore, a judgment of divorce is not a "conveyance" under the UFCA.

Plaintiffs' reliance on *In re Fordu*, 201 F3d 693 (CA 6, 1999) for the proposition that a judgment of divorce can be a conveyance is misplaced. In *Fordu*, a wife won the lottery while she was married. She later divorced her husband. The husband and wife executed a separation agreement in which the husband relinquished his rights in the lottery proceeds. The agreement was incorporated into the judgment of divorce. The husband later filed for bankruptcy. The bankruptcy trustee sued the wife to void the husband's transfer of his interests in the lottery proceeds. The bankruptcy court dismissed the trustee's action, but the bankruptcy appellate panel reversed, holding that, under Ohio law, the lottery proceeds constituted marital property in which the debtor had an interest at the time of the dissolution of the marriage and that the judgment of divorce was not entitled to any claim-preclusive effect. The Sixth Circuit agreed with the appellate panel.

Fordu is distinguishable from the present case. In *Fordu*, the husband specifically relinquished any right he had to his wife's lottery winnings in the judgment of divorce. In the present case, Ritsema did not have an interest in his wife's condominium before the divorce, and, thus, no such interest could be distributed in the judgment of divorce. Further, *Fordu* relied in part on the Ohio Uniform Fraudulent Transfer Act ("UFTA"), Ohio Rev Code § 1336.01 *et seq.*, which broadly defines "transfer" (analogous to "conveyance" in Michigan's UFCA) as "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Ohio Rev Code § 1336.01(L). Under the Ohio enactment of the UFTA, the definition of "transfer" is expansive, broad, and inclusive; whereas, the UFCA's definition of "conveyance" is narrowly defined by reference to the several listed examples.

Because the trial court correctly determined that this Court would not have reversed the trial court in the action underlying the malpractice claim, plaintiffs cannot demonstrate that defendant's errors proximately caused any harm. *Simko, supra* at 655. Therefore, defendant was entitled to summary disposition.

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio